R.D. # 0016-02
Vicksburg, MS.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 22

MISSISSIPPI ACTION FOR PROGRESS, INC.
Employer

and **Case 22-RD-1351**
(Formerly 15-RD-834)

INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND COMMUNICATIONS WORKERS OF AMERICA, LOCAL 772
Union

and

EMMER STEWART, An Individual Petitioner

MISSISSIPPI ACTION FOR PROGRESS, INC.
Employer

and **Case 22-RD-1350**
(Formerly 15-RD-825)

INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND COMMUNICATIONS WORKERS OF AMERICA, LOCAL 772
Union

and

MARY LOUISE SIMS NETTLE, An Individual Petitioner

DECISION AND DIRECTIONS OF ELECTION

The instant Decision results from the filing of two decertification petitions by two petitioners regarding two separate units of employees at the Employer's Vicksburg, Mississippi locations. Each petitioner seeks an election to determine whether or not International Union of Electronic, Electrical, Salaried, Machine and Communications Workers of America, Local 772, the certified bargaining representative,[1] continues to represent each of the two units of employees employed at the Employer's King Center and Cedars Center locations.[2]

The Union asserts that both decertification petitions are inappropriate because the Petitioner in Case 22-RD-1351, formerly 15-RD-834, Emmer Stewart, occupied a supervisory position when she circulated and filed the petition; and the other petition, 22-RD-1350, formerly 15-RD-825, includes two non-bargaining unit members, Nazarita Franklin and Rosemary Craft. Based on the facts and analysis discussed below, I reject these arguments and order elections in both of these cases.

Pursuant to provisions of Section 3(b) of the Act, the Board has delegated its authority in these proceedings to the undersigned.[3]

Upon the entire record in this consolidated proceeding,[4] the undersigned finds:

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[1] Although certified as the collective-bargaining representative for both units on June 19, 2000, the Union and the Employer have not signed a collective bargaining agreement for either unit. Thus, there is no contract bar.

[2] Until January 2002, the Employer had only one location in Vicksburg, the King Center. In January 2002, a second Vicksburg location, the Cedars Center, opened and some employees from both units transferred to the second location. Thus, employees employed in both units are present at both locations.

[3] These cases were transferred to Region 22 by order of the Board's General Counsel, dated October 1, 2002, for decision.

[4] Briefs filed by the parties were considered.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act; and it will effectuate the purposes of the Act to assert jurisdiction herein.[5]

3. The labor organization involved claims to represent certain employees of the Employer.[6]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer, hereby referred to as **Unit 1**, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the act:

> **All full time and regular part-time teachers, teachers aides, family caseworker aides, bus drivers, bus monitors, cooks, assistant cooks, janitors, maintenance employees and non-professional aides employed by the Employer at its Vicksburg, Mississippi facilities, excluding, center administrator, center clerk, family caseworkers, head teacher, managerial employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.**[7]

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[5] The parties stipulated, and I find, that during the preceding twelve months period the Employer derived revenues in excess of $250,000 and purchased and received goods and materials valued in excess of $5,000 at its Vicksburg facilities that were shipped directly from points outside the state of Mississippi.

[6] The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[7] The parties stipulated that since the units were certified, the Employer has opened a second center, the Cedars Center, and that both bargaining unit descriptions should be amended to reflect that development.

6. The following employees of the Employer, herby referred to as **Unit 2**, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described *infra*:

> **All full time and regular part time family caseworkers employed by the Employer at its Vicksburg, Mississippi facilities, excluding all other employees, center administrator, center clerk, head teacher, managerial employees, professional employees, guards, confidential employees and supervisors as defined in the Act.**[8]

1. FACTS

A. Background:

The Employer is a non-profit Mississippi corporation engaged in providing childcare and transportation services for eligible three and four year olds enrolled in Federally funded Head Start programs at the Employer's King and Cedars Centers.[9] Record evidence establishes that Head Start is a comprehensive social and educational program providing, among other things, nutrition and health care to children, as well educating their parents in these areas. The provider year tracks the academic year, running from approximately August to the following June.

B. Case 22-RD-1351

Turning first to Case 22-RD-1351, formerly 15-RD-834, the larger unit, the essential issue is whether Petitioner, Emmer Stewart, is a supervisor, as the Union contends, when she circulated and filed the decertification petition or a teacher and

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[8] The classification of confidential employees has been added by Stipulation of the parties to the bargaining unit description.

[9] Although the Employer operates other Head Start centers in the State of Mississippi, only the King Center and Cedar Center in Vicksburg are at issue in this decision.

bargaining unit member as she contends.[10] Stewart was hired in 1993 as a teacher's aide. She was promoted to teacher in 1996 or 1997 and has worked continuously in that title since then. No record evidence has been adduced to show that Stewart worked in any other title during the requisite period.[11]

The King Center, where Stewart is assigned, has approximately 18 teachers and 17 or 18 teachers' aides. In addition to the classroom duties detailed in the teacher's job description, there is copious record testimony as to what tasks teachers perform outside of the classroom. Some of those outside tasks are what the Union relies on to support its supervisory assertion regarding Stewart, alleging them to be secondary indicia of supervisory status.

Teachers and aides have both hall monitoring duty and bus riding duty. Bus riding duty is compensated and voluntary, hall monitoring duty appears to fall within the parameters of ordinary tasks. Stewart testified that she does not volunteer for bus duty because she has a handicapped son she has to transport.[12] Although Stewart may do less hall monitoring duty than other teachers, the Employer's exhibits document that she did perform this task. The Union does not contend that Stewart's non-

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[10] Case 22-RD-1351 (formerly 15-RD-834) was filed on June 4, 2002. Case 22-RD-1350 (formerly 15-RD-825) was filed on February 25, 2002. The two petitions were consolidated for hearing.

[11] Substantial record testimony has been offered regarding a state-funded summer program providing educational and social services to children up to the age of 12 or 13 during the non-academic months. It is uncontroverted that Stewart worked several summers as a supervisor and administrator in that program. However, that employing entity is separate and distinct, having no relationship with the instant Employer. Therefore, I find all testimony related to the summer program irrelevant and I did not rely on it in reaching my decision.

[12] Stewart was out on medical leave from February to May, 2002, when her son had surgery.

performance of these extra tasks exhibits supervisory status, but rather the ones she did, as described below.

The office clerical position at the King Center remained vacant from August 2001 until it was filled in February 2002, around the time that Stewart was out on a family medical leave. The clerical vacancy resulted in the Center's Administrator, Patricia Anderson, asking various teachers to help with the clerical tasks. Prior to February, 2002, Stewart frequently answered phones in the administrative office, perhaps even on a daily basis. There is no accurate gauge as to how much time Stewart devoted to answering the phone. However, Stewart was not the only teacher to perform that task. Nor was Stewart the only teacher to eat lunch in the office with the Administrator as opposed to the cafeteria, or to attend workshops, a task cited in the job specification for teacher. Uncontroverted record evidence established that teachers who are eating something other than foods available to the children in the cafeteria have to eat in the office, an accommodation available to all teachers and aides. Stewart occasionally escorted reassigned children from one class to another, but so did other teachers. Unlike other teachers, Stewart posted the lists of hall monitors and bus monitors, but there is no record evidence that indicates Stewart determined who would be assigned as a hall monitor or a bus monitor. Rather, the record reveals that those decisions were made by the Administrator and simply posted by Stewart. More unique to Stewart was the recording of time and attendance data, done at the request of the Administrator. Stewart was asked to perform this task, which she does once a month on non-work time and without compensation, because the Administrator

suffers from carpel tunnel syndrome and writing, or "scribing," as the Administrator describes it, is a hardship.

More significant was the time Stewart devoted to distributing applications to potential employees. Of the four union witnesses who testified that they received an application from Stewart, only one noted that at the time she received the application she thought Stewart was a supervisor. However, she testified that she thought anyone distributing applications was a supervisor. Yet despite that perception, she stated that she thought the hiring decision would be made by someone other than Stewart. Presumably, after hiring, she learned that Stewart was a teacher. Another Union witness testified that she thought Stewart was a non-professional aide when she saw her sitting at the secretary's desk in the Administrative office, doing clerical work, when the witness came in for an application. Despite this testimony, that Stewart was doing work other than classroom work, there is no indication of how much time she spent on these extra-curricular duties, as each witness could only testify to brief opportunities to view Stewart in the office. Nor is there any record testimony establishing that Stewart was not fulfilling her classroom duties. Lastly, the Union relies on the fact that Stewart was listed third on the information contact forms for the King Center. Uncontroverted record testimony established that the contact person must be on site and that no supervisory status is required or implied by being listed on the form. Nor would Stewart's salary, $7.70 per hour, among the lowest paid of the teachers augur for supervisory status.

It is uncontroverted that Stewart never held herself out to be a supervisor, nor did the Employer ever indicate to anyone that Stewart held a supervisory position. All

four union witnesses testified in the negative to all aspects of supervisory indicia regarding Stewart, i.e., they did not believe that Stewart had the ability to hire, fire, assign, discipline, transfer, promote or in any other way effect their job status.

C. Case 22-RD-1350

Turning now to the other petition, Case 22-RD-1350 (formerly 15-RD-825) I find that the Union's challenge to the inclusion of family caseworkers Nazarita Franklin and Rosemary Craft in bargaining **Unit 2**, to be unfounded. The Union bases its challenge on two factors: that these two individuals do not possess the requisite education and experience to meet the job specifications of family caseworkers; and that the case load that they carry is more appropriate to the job specification for family caseworker aide than family caseworker. Thus, it is the Union's position that Franklin and Craft are properly included in **Unit 1**, that contains the family caseworker aide title, but not in **Unit 2**. Both the Center Administrator and the Director of Finance testified without contradiction that the family caseworker aide position is one that has not been filled for the past couple of years. Rosemary Craft, who was hired as a teacher's assistant in 1997, moved over to the family caseworker aide title in 1998 and worked in that capacity until March of 2000, when she became a family caseworker and was give a requisite raise. Craft, like all the other witnesses who testified on this issue, noted that there is no distinction in her job duties and those of other family caseworkers. All family caseworkers perform virtually the same functions.

It appears that there was at one time a distinction in the number of cases handled by family caseworkers and those handled by aides, with the aides handling more than the family caseworkers, seemingly because they had less responsibility on

the case assignments. Now, case distribution is just about equal among the five individuals working in the family caseworker title: about 80 cases per individual, a far cry from the recommended 30 cases contained in the family caseworker description, and the 45 contained in the family caseworker aide description. More importantly, every witness who testified acknowledged that all family caseworkers perform the same functions.

Nazarita Franklin was hired in 2000 as a family caseworker. She has a Bachelor of Science degree in social work but has yet to take the state-licensing exam to become a social worker. Craft has a year of academic work to complete before she will be eligible to take the state-licensing exam. The Union asserts that their lack of state license precludes them from meeting the requirements the Employer has established for the family case worker position.[13] I note, in passing, that these educational and licensure requirements only became effective sometime in 2000. Prior to that, employees filled these positions without the subsequent requisite educational qualifications and were grandfathered in for state licensing purposes. Two of the five family caseworkers currently employed have been grandfathered in for licensure purposes, having lacked the formal education requirement to otherwise qualify for the title under the 2000 requirements.

2. ANALYSIS

A. Supervisory Status:

[13] The job specification established by the Employer for the position of family caseworker requires a Bachelor of Science degree in social work as well as state licensure. There is no indication in the record if any other authority, i.e., the federal government that funds the Head Start programs, mandates these requirements.

Section 2(11) of the Act defines "supervisor" as:

> …any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well established that an individual need possess only one of the enumerated indicia of authority in order to be encompassed by the definition, as long as the exercise of such authority is carried out in the interest of the employer, and requires the exercise of independent judgment. *Big Rivers Electric Corp.,* 266 NLRB 380, 382 (1993). The legislative history of Section 2(11) indicates that Congress intended to distinguish between employees who may give minor orders and oversee the work of others, but who are not necessarily perceived as part of management, from those supervisors truly vested with genuine management prerogatives. *George C. Foss Co*., 270 NLRB 232, 234 (1984). The Board takes care not to construe supervisory status too broadly because the employee who is deemed a supervisor loses the protection of the Act. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

The exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not require a finding that an employee is a supervisor within the meaning of the Act. *Somerset Welding & Steel*, 291 NLRB 913 (1988). Designation of an individual as a supervisor by title in a job description or other documents is insufficient to confer supervisory status. *Western Union Telegraph Company*, 242 NLRB 825,826 (1979). The mere issuance of a directive or a job description setting forth supervisory authority is also not determinative of supervisory

status. *Bakersfield Californian*, 316 NLRB 1211 (1995); *Connecticut Light & Power Co.,* 121 NLRB 768,770 (1958).

In *Kentucky River Community Care, Inc.,* 121 S.Ct. 1861, 1866 (2001), the Supreme Court agreed with the Board that the burden of proving supervisory status rests on the party asserting that status. Absent detailed, specific evidence of independent judgment, mere inferences or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quadrex Environmental Co*., 308 NLRB 101 (1992); *Sears Roebuck & Co.,* 304 NLRB 193 (1991). Whenever evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, the Board will find that supervisory status has not been established. *Phelps Medical Center*, 295 NLRB 486, 490-491 (1989).

As noted above, it is well settled that the party raising the issue of supervisory status bears the burden of proof. *Kentucky River Community Care, Inc.,* above at 1866; *Youville Health Care Center,* 326 NLRB 495 (1998); *Alois Box Co., Inc.,* 326 NLRB 1177 (1998). Regarding Emmer Stewart, record evidence establishes that none of the primary indicia of supervisory status has been met. Stewart has exhibited no ability to hire, fire, reward, punish or responsibility direct the work force based on independent judgment. All the Union witnesses testified that Stewart never held herself out as a supervisor, management never represented her as such, and they had no knowledge of Stewart exercising independent judgment regarding any aspect of their employment. The only witness to testify that she initially thought Stewart was a supervisor explained that she would have thought anyone handing out an employment application was a supervisor. Clearly, individual misperception cannot create

supervisory authority where none has been granted or exercised. Another Union witnesses testified that she thought Stewart was a nonprofessional aide because she appeared to function in a clerical capacity. Based on record testimony, I find that Stewart possessed none of the primary indicia of supervisor status.

It is equally well settled Board law that no amount of secondary indicia will cumulatively rise to the level of supervisory authority in the face of a lack of independent judgment, nor did I find record support for the assertion that Stewart exhibited even the secondary indicia of supervisory status such as reporting problems with employees to management, a higher rate of pay or other perks of employment. *Lampi, LLC,* 322 NLRB 502 (1996); *Lincoln-Mercury Mitsubishi,* 321 NLRB 586 (1996); *North Shore Weeklies, Inc.,* 317 NLRB 1128 (1995); *Jordan Marsh Stores,* 317 NLRB 460 (1995); *J.C. Brock Corp.,* 314 NLRB 157 (1994); *Bellows Electric Supply of Northfield*, 311 NLRB 878 (1993). For the factual and legal reasons cited above, I find that Emmer Stewart is not a supervisor of the Employer and that the petition she filed is suitable for processing with respect to **Unit 1**.

B. Unit Placement

Focusing lastly on the issue of the appropriate unit placement of Nazarita Franklin and Rosemary Craft, I find that they share a community of interest with other family caseworkers, Mary Louise Sims Nettle, Mary Jenkins and Laura Taylor, based on the uncontroverted record testimony of all the witnesses that there are no differences in the jobs that they perform. Again, Board law is not ambiguous in this area. The prime focus of the Board's inquiry is the community of interest shared by the employees. *Kalamazoo Paper Box Corp.,* 136 NLRB 134 (1962); *Speed Track*

Prods. Group, 320 NLRB 627 (1995); *K.G. Knitting Mills,* 320 NLRB 374 (1995); *Sears Roebuck & Co.,* 319 NLRB 607 (1995); *Scolari's Warehouse Mkts.,* 319 NLRB 153 (1995); *Virginia Mfg., Co.,* 311 NLRB 992 (1993). While I am aware that the two individuals in question do not meet the job specifications imposed by the Employer, I cannot ignore uncontroverted record testimony that they perform the same jobs under the same working conditions as the three other employees admittedly in the unit. In these circumstances, I find that Franklin and Craft share a sufficient community of interest with other **Unit 2** employees warranting their inclusion in **Unit 2**.

DIRECTIONS OF ELECTION

Elections by secret ballot shall be conducted by the Regional Director for Region 15 among the employees in the units found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less that 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the units may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees

engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote in each of the two units here shall vote whether or not they desire to be represented for collective bargaining purposes by **International Union of Electronic, Electrical, Salaried, and Machine and Communications Workers of America, Local 772**.

LISTS OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to lists of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB* v. *Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, three (3) copies of an election eligibility list containing the full names and addresses of all the eligible voters in each of the units found appropriate above shall be filed by the Employer with the Regional Director for Region 15, who shall make the lists available to all parties to the elections. *North Macon Health Care Facility,* 315 NLRB 359 (1994). In order to be timely filed, such lists must be received in NLRB Region 15, 1515 Poydras Street, Room 610, New Orleans, Louisiana 70112-3723 on or before **November 6 , 2002**. No extension of time to file these lists shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **November 13, 2002.**

Signed at Newark, New Jersey this 30th day of October, 2002.

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